STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2003
v	No. 235019 Oakland Circuit Court
LEE ARTHUR SHELBY, Defendant-Appellant.	LC Nos. CR 99-164610-FH CR 99-164611-FH CR 99-164618-FH

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant pleaded guilty of habitual offender, second. MCL 769.10. He was sentenced to three consecutive terms of one to thirty years in prison. Defendant appeals as of right from the judgments of conviction and sentence. We affirm.

Defendant first argues that he was denied a fair trial by the trial court's handling of an issue of juror misconduct that arose during trial. Defendant claims error in the court's effective exclusion of defendant from the courtroom while jurors were questioned, the court's cursory questioning of the jurors, and the court's statements to the jurors, which had the effect of validating their concerns. We disagree.

During trial, a juror reported to the court clerk that another juror had made comments that she had parked near defendant and was afraid for her life to go to her car alone. The court agreed with counsel that the jurors should be questioned. It was agreed that the juror that reported the interaction would first be questioned outside the presence of the other jurors. The prosecutor suggested that the hearing be conducted outside defendant's presence, and the court asked defendant if he would have any problem waiting in the hallway. Defendant responded that he would, and the hearing continued with defendant present. The juror was brought to the courtroom and gave an account of what the other juror had said. A bench conference ensued, at the conclusion of which defense counsel asked to speak to defendant in private. The two went into the hall, and returned about thirty seconds later. Defense counsel announced that defendant would be willing to wait in the hall during the hearing. The court confirmed with defendant that he was agreeable, and defendant left the courtroom. The jury panel was then brought in, and the court explained that defendant was asked to wait in the hallway so that the jurors would feel free

to say whatever was on their minds about whether they would be adversely influenced by what was said. The juror who had the parking-lot interaction expressed reservations. The court questioned the jurors:

> THE COURT: I should tell all of you that, uh, its common for jurors to be concerned, uh, about their safety. In 23 years as a judge, I've never had a problem. There's never been a problem. But, um, if you guys are sitting there with a frame of mind that he's dangerous, you can't be on the jury.
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> * * *
>
> Uh, so can you, the rest of you, continue to be impartial in the case? Is there anybody that would feel otherwise? Let me see a show of hands of all you who feel you can be just as fair today as you were when you started the case. A show of hands. Okay, everybody raised their hands, including [the juror who had the interaction.]
>
> [Some further colloquy with the juror and a bench conference.]
>
> THE COURT: Um, okay, we've all agreed then that we want all of you to serve except [the juror who had the interaction.]
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> * * *
>
> JUROR: I - - I'm really sorry.
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> THE COURT: Well, that's all right. And I'm glad that it came out that - -
>
> JUROR: Well, I didn't know - - you know, I mentioned it to the person down there and they didn't react at all, so I decided - -
>
> THE COURT: Maybe what - -
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> JUROR: All I know is I wanted somebody to walk down with me.
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> THE COURT: Maybe what we should also do, um, there's two sides of the building. So that no one has any concerns in the future, we can maybe ask, uh, Mr. Shelby and his family members to park on the north side.
>
> [DEFENSE COUNSEL]: I have no problem with that, your Honor.
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> THE COURT: And the jurors can all park on the south side. Okay, well, then we are going to excuse you. Again, thank you very much for being frank with us.

Defendant filed a post-conviction motion challenging the court's handling of the matter. After hearing testimony, the court accepted that defense counsel's conversation with defendant in the hall was brief, and that counsel did not inform defendant that he had a constitutional right to be present in the courtroom, and that defendant looked upset as he waited in the hallway. The

court found, however, that defendant had not been coerced to remain in the hall and was not prejudiced. We agree.

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v Stincer*, 482 US 730, 745; 107 S Ct 2658; 96 L Ed 2d 631 (1987). This does not mean that a defendant has a 'constitutional right to be present at every interaction between a judge and a juror.' *United States v Gagnon*, 470 US 522, 526; 105 S Ct 1482; 84 L Ed 2d 486 (1985), quoting *Rushen v Spain*, 464 US 114, 125-126; 104 S Ct 453; 78 L Ed 2d 267 (1983) (Stevens, J., concurring in judgment). The absence of a defendant during questioning of a juror requires reversal only if a reasonable possibility of prejudice resulted. *People v Morgan*, 400 Mich 527, 535-537; 255 NW2d 603 (1977).

The juror that expressed reservations regarding her safety was excused from service. The remaining jurors stated that they could remain impartial. We conclude that there is no reasonable possibility that prejudice resulted. *Morgan, supra*. Further, defendant stated to the court that he was agreeable to remaining outside. Defendant clearly understood that he was being asked, rather than ordered, to remain outside. That defendant may not have understood that the reason he was being permitted to make the decision whether to stay or remain was that the constitution guaranteed him the right to be present is not dispositive because it is clear that defendant affirmatively agreed to leave the courtroom under circumstances where he understood that the choice was his.

We also find no error in the court's handling of the situation. The examination of the jurors was sufficient to determine that the remaining jurors were committed to, and perceived themselves as being capable of, remaining fair and impartial. This is not a case where a juror reported some conduct on defendant's part that might reflect negatively on him. Rather, it appears that it was perceived that one juror reacted somewhat irrationally to the fact that she encountered defendant in the parking lot. There was no need to more deeply probe whether the other jurors were prejudiced by her comments or reaction.

Lastly, the court's comments did not give credence to the juror's fears. The court commented that while it is common for jurors to be concerned for their safety, the court had never encountered a problem, thus indicating that while jurors often have such concerns, they are unjustified. The court's suggestion that the jurors and defendant park on different sides of the building was a clear attempt to avoid any further interaction, rather than an implied statement to the jury that the excluded juror's concerns were justified.

Defendant next contends that his trial counsel was ineffective and that the court erred in denying defendant a *Ginther*[1] hearing on this claim. "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). "A defendant must show that, but for the error, the result of the proceedings would have been

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

different and that the proceedings were fundamentally unfair or unreliable." *Id.* Defendant asserts that his counsel was ineffective in failing to object to the court's handling of the jury bias issue, in failing to move to exclude testimony regarding defendant's post-arrest statements to and interactions with police, "which were involuntarily made and undertaken, and which placed before the jury allegations regarding uncharged misconduct," and in failing to object, on the ground of lack of notice under MRE 404(b)(2), to the admission of testimony regarding threats allegedly made by defendant against co-defendant. We find no reversible error.

Counsel was not ineffective in his handling of the jury bias matter. Defendant was not prejudiced by counsel's advice to acquiesce to the court's request, or implied request, that he agree to wait in the hall while the jurors were questioned. Further, the court's handling of the matter did not call for an objection.

At trial, officers testified that defendant signed a *Miranda*[2] rights waiver form and agreed to make a statement. The statement was presented to the jury. Further, after giving the statement defendant was invited to work for the police in exchange for charge or sentence concessions. Defendant agreed, was released, and spent an afternoon with police showing them places in Pontiac where cocaine could be bought.

Defendant testified at trial that the question of cooperation arose before he was advised of his rights, that he only agreed to talk because he was told that "if you agree to work with us or give us the next biggest fish . . .[w]e'll let you walk right out of here right now." In his affidavit in support of his motion for new trial, defendant asserted:

> After my arrest, I only spoke to the officers, and agreed to meet and cooperate with them because I felt that the promises they made me left me no real choice. I communicated this to my trial attorney. He never discussed the possibility of seeking the suppression of evidence relating to my statements and meetings with the officers from evidence.

Defendant argues that counsel was ineffective for failing to file a pre-trial motion to suppress evidence of defendant's statements and interactions with police. The court denied the motion for new trial on this basis, stating, "defendant has failed to demonstrate that his confession was involuntary." In light of the extensive testimony at trial regarding the circumstances of the statements, the circuit court was not obliged to hold an evidentiary hearing. The court would have been called upon to determine whether the statement was voluntary, and was apparently satisfied, based on the trial testimony, that it was. While defendant argues that he should have been given the opportunity to show that his statement was involuntary, he has not shown that he would have presented evidence to compel a different conclusion.

Next, defendant contends that counsel was ineffective in failing to object to Deputy Allen's account of his statements regarding co-defendant on the basis that the prosecutor failed to give the notice required by MRE 404(b)(2). Again, we disagree. Defendant's statements to Deputy Allen were statements pertinent to the instant charges and co-defendant's cooperation

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

with police. They were not offered to show prior bad acts, only statements indicating guilt. Counsel was not obliged to object on the basis of lack of notice under the court rule. Further, defendant countered the testimony by his own testimony, and there is no reason to believe that the defense might have handled that matter differently, or more effectively, had the notice been given.

Lastly, defendant argues that he was denied a fair trial by the prosecutor's improper statements that defendant "probably had other transactions" and that "the defense attorney's job is to muddy the waters for you." We disagree.

The prosecutor's initial statement that defendant probably had other transactions was addressed to the money found in the vehicle, and was not improper. After defendant objected, the prosecutor responded: "Judge, we're claiming that he's a drug dealer. It's argument." Defense counsel responded that the prosecutor still had to argue the facts, and the court stated: "Well, the argument has to be limited to what the testimony's been." The prosecutor then confined himself to the evidence. We conclude that this exchange had no effect on the outcome of the trial. Similarly, the bulk of the prosecutor's argument on rebuttal was unobjectionable. The prosecutor properly argued that the matters focused on by defense counsel were minutiae intended to divert the jury's attention from the overwhelming evidence. The single statement that defense counsel's job is to muddy the waters for the jury did not impugn defense counsel's integrity and did not affect the outcome of the trial.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Christopher M. Murray